

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET No. 28387

**NORFOLK AND WESTERN RAILWAY COMPANY—
TRackage RIGHTS—BURLINGTON NORTHERN, INC.**

Decided June 6, 1978

On administrative review, prior order of Review Board Number 5, served September 13, 1977, which approved the transaction, affirmed. Employee protection modified as set forth in the appendix to this decision.

John S. Shannon, Donald M. Tolmie, and James C. Bishop, Jr. for applicant.

William G. Mahoney and John O'B. Clarke, Jr. for protestants.

REPORT OF THE COMMISSION ON RECONSIDERATION

DIVISION 1, ACTING AS AN APPELLATE DIVISION, COMMISSIONERS
BROWN, GRESHAM, AND CHRISTIAN

BY DIVISION 1:

By petition filed October 3, 1977, the Railway Labor Executives' Association (RLEA)¹ seeks administrative review of the order of Review Board Number 5 served September 13, 1977. The reply of the Norfolk and Western Company (N&W), filed October 24, 1977, also proposes modification of the order. Both the petition and the reply are addressed to the issue of the appropriate employee protective conditions that should be imposed in trackage rights cases filed under section 5(2) of the Interstate Commerce Act (the act), as amended by the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act).

The review board imposed the conditions for protection of employees discussed in *Oregon Short Line R. Co.—Abandonment—Goshen*, 354 I.C.C. 76 (1977), in order to comply with the mandate of amended section 5(2)(f) of the act, which requires employee protective conditions that will be no less protective of the

¹A late-filed petition submitted by the Brotherhood of Locomotive Engineers was rejected.
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interests of employees than the conditions imposed pursuant to prior section 5(2)(f) and the conditions established pursuant to section 405 of the Rail Passenger Service Act.

RLEA alleges that the *Oregon Short Line* conditions are deficient because they fail to provide the level of protection formerly imposed under old section 5(2)(f). Applicant notes that none of its employees will be adversely affected by its use of and operation under the trackage rights, and that it will not take exception to whatever conditions are imposed. N&W asserts its position on the issue of proper employee protection. N&W claims that the Oklahoma² conditions, modified as it proposes, would provide an adequate level of protection and would meet the statutory requirements.

DISCUSSION AND CONCLUSIONS

Review Board No. 5 relied on our decision in *Oregon Short Line* when it imposed employee protective conditions in this case. In *Oregon Short Line* we found that the arrangement for the protection of employees negotiated between the National Railroad Passenger Corporation and various railway employee representatives and approved by the Secretary of Labor on April 17, 1971 (commonly known as the Appendix C-1 conditions), was the arrangement established pursuant to section 405 of the Rail Passenger Service Act upon which we should base future employee protection under section 1a(4) of the act. Since the operative language of section 5(2)(f) is almost identical to that of section 1a(4),³ we believe the review board acted properly in imposing the employee protective conditions enunciated in *Oregon Short Line* in this case. Thus, our reasoning in *Oregon Short Line* supports the review board's decision.

Before proceeding with our discussion of the contentions of the parties we should indicate that certain modifications have been made in the conditions adopted in *Oregon Short Line* by our most recent report and order in that proceeding at 354 I.C.C. 584 (1978). For the reasons set forth in that report, we shall also modify the employee protective conditions imposed in this case in the same

²*Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177 (1944).

³Section 1a(4) requires employee protective provisions to "be at least as beneficial to such interests as provisions established pursuant to section 5(2)(f) of this Act and pursuant to section 405 of the Rail Passenger Service Act***."

Section 5(2)(f) requires an arrangement for employee protective "no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 405 of the Rail Passenger Service Act.***."

manner. Any further reference to the employee protection imposed in *Oregon Short Line* shall be to the conditions as modified. The modified conditions are set forth in the appendix to this report, with appropriate modifications to make them applicable to trackage rights transactions.

Petitioner claims that the Appendix C-1 conditions are less protective of the interests of employees than the conditions previously imposed pursuant to section 5(2)(f). It claims those conditions are insufficient in this case because they contain no provisions equivalent to sections 4 and 5 of the Washington Job Protection Agreement; petitioner cites *Southern Ry.—Control—Central of Georgia Ry. Co.*⁴ for the proposition that sections 4 and 5 of the Washington Agreement are indispensable prerequisites to effectuating a valid order of approval under section 5(2) of the act.

We do not believe section 5(2)(f) of the act requires us to impose section 4 and 5 of the Washington Agreement in this proceeding or in other ordinary trackage rights proceedings. Petitioner's argument for imposition of such protection is based upon that part of amended section 5(2)(f) which requires protection equal to the protection imposed pursuant to that section prior to its amendment by the 4R Act. We must determine what the standard of protection was under old section 5(2)(f).

In the past the Commission imposed different employee protective conditions in different types of section 5(2) cases. For example, the *Oklahoma* conditions were ordinarily imposed in trackage rights cases and the *New Orleans*⁵ conditions, with modifications as were necessary, were frequently imposed in merger-control-type cases. The *Oklahoma* conditions which had been used in trackage rights cases do not contain protection equivalent to sections 4 and 5 of the Washington Agreement.

Congress was aware of the fact that different employee protective conditions had been used in different types of transactions when it passed the 4R Act. The 4R Act does not indicate any disapproval of the fact that different protective conditions had been used in different cases. Since the Commission did not impose sections 4 and 5 of the Washington Agreement in trackage rights cases in the past, our failure to impose those sections in this case cannot now (under the 4R Act) be considered inappropriate. The resulting arrangement is not less protective of the interest of employees than the

⁴331 I.C.C. 151 (1967).

⁵*New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952).

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arrangement imposed under old section 5(2)(f) in trackage rights cases.

Nothing in *Southern Ry.—Control—Central of Georgia, supra*, is to the contrary. That case was a control proceeding where a reduction in force was contemplated, and a consolidation of seniority rosters would be required. No consolidation of forces is required in ordinary trackage rights cases. There is no need for sections 4 and 5 of the Washington Agreement to be imposed in them.

N&W proposes its own set of conditions consisting of the *Oklahoma* conditions with the addition of certain provisions from the Appendix C-1 conditions. In support of its contention that the conditions it proposes would provide a proper standard of protection, N&W incorporates by reference a portion of the American Association of Railroads' "Comments of the Association of American Railroads Upon Proposed Conditions for Protection of Employees" (AAR Comments). Those comments were invited by the report on reconsideration in No. AB-36 (Sub-No. 2), *Oregon Short Line, supra*.

AAR's basic argument is that Congress did not intend to have the Commission change its employee protective policy to a significant extent and that adopting the Appendix C-1 conditions is contrary to that congressional intent. The AAR comments then go on to address the further protection that it believes the amendment to section 5(2)(f) requires. We agree with applicant that the argument of the American Association of Railroads, even though it is addressed to the proper employee protective standards in abandonment proceedings, is relevant to this case. However, we believe those contentions are adequately addressed in the latest report in *Oregon Short Line*. We see no need to address them here.

For the reasons set forth above and in our latest report in *Oregon Short Line*, we find that the petition for administrative review and the modifications proposed by the applicant should be denied.

It is ordered:

- (1) The petition for administrative review is denied.
- (2) The modifications proposed by applicant are denied.
- (3) The employee protective conditions be modified as set forth in the appendix to the attached report.
- (4) Except as modified the order of Review Board No. 5 is affirmed.

(5) The order of Review Board No. 5 served September 13, 1977, as modified, shall be effective 20 days from the date of service of this order.

By the Commission, Division 1, Acting as an Appellate Division.
Commissioner Gresham concerning in the result.

H. G. HOMME, JR.
Acting Secretary.

(SEAL)

NOTE: The parties are advised that this decision is administratively final under the provisions of section 17(9)(c) of the Interstate Commerce Act. Any further administrative appeal can be entertained only under section 17(9)(d) of the act which permits such an appeal only if the entire Commission finds that a matter of general transportation importance is involved, that clear and convincing new evidence has been presented, or that there exist changed circumstances which would materially affect the decision made herein. Such an appeal must be filed within 20 days of the date of service of this order.

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APPENDIX

Article I

1. Definitions.—(a) "Transaction" means acquisition by a railroad of trackage rights over, joint ownership in, or joint use of, any railroad line or lines owned or operated by any other railroad, and terminals incidental thereto.

(b) "Displaced employee" means an employee of the railroads who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of the railroads who, as a result of a transaction is deprived of employment with the railroads because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means that period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroads prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that there shall be no duplication or pyramiding of benefits to any employees, and, provided further, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities, and obligations accompanying such benefits.

4. When the railroads contemplate a transaction, they shall give at least twenty (20) days' written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroads and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be effected by such transaction, including an estimate of the number of employees of each class affected by the intended changes.

At the request of either railroad or representatives of such interested employees, negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix shall commence immediately and continue for not more than twenty (20) days from the date of notice. Each transaction which will result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or

decision under this section 4. If at the end of the twenty- (20-) day period there is a failure to agree, the negotiations shall terminate and either party to the dispute may submit it for adjustment in accordance with the following procedures:

(a) Within five (5) days from the termination of negotiations, the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee, then the National Mediation Board shall immediately appoint a referee.

(b) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(c) The decision of the referee shall be final, binding, and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(d) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

Notwithstanding any of the foregoing provisions of this section, at the completion of the twenty- (20-) day notice period the railroads may proceed with the transaction, provided that all employees affected (displaced, dismissed, rearranged, et cetera) shall be provided with all of the rights and benefits of this appendix from the time they are affected through to expiration of the seventy-fifth (75th) day following the date of notice of the intended transaction. This protection shall be in addition to the protection period defined in article I, paragraph (d). If the above proceeding results in displacement, dismissal, rearrangement, et cetera other than as provided by the railroads at the time of the transaction pending the outcome of such proceedings, all employees affected by the transaction during the pendency of such proceedings shall be made whole.

5. Displacement allowances.—(a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during

the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. Dismissal allowances.—(a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroads shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, or failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon employment rights of other employees under a working agreement.

7. Separation allowance.—A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. Fringe benefits.—No employee of the railroads who is affected by a transaction shall be deprived during his protective period of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, relief, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroads, in active service or on furlough as the case may be to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. Moving expenses.—Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction.

and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not to exceed 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for a reasonable time hereafter and the ways and means of transportation to be agreed upon in advance by railroad and the affected employee or his representatives; provided, however, that changes in place of residence which are not a result of the transaction, which are made subsequent to the initial change or which grow out of the normal exercise of seniority rights, shall not be considered to be within the purview of this section; provided further, that the railroad shall, to the same extent provided above, assume the expenses, et cetera for any employee furloughed within three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provisions of this section unless such claim is presented to railroad within 90 days after the date on which the expenses were incurred.

10. Should the railroads rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. Arbitration of disputes.—(a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute on controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee.

Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroad, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. Losses from home removal.—(a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his protective period as a result of the transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are made subsequent to the initial changes caused by the transaction and which grow out of the normal exercise of seniority rights, shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employees, or their representatives, and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceeding. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position

comparable to that which he held when terminated or furloughed, even though in a different craft or class, on railroad which he is, or by training or retraining physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under sections 1 or 2 of this article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

ARTICLE IV

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established pursuant to section 5(2)(f) of the Interstate Commerce Act. In so doing, changes in wording and organization from arrangements earlier developed under section 5(2)(f) have been necessary to make such benefits applicable to transactions as defined in article I of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act and pursuant to section 405 of the Rail Passenger Service Act.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

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